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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 669

WILLIAM A. ALBAUGH, *Petitioner*,

v.

DISTRICT OF COLUMBIA GOVERNMENT, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, dated December 17, 1959, affirming the judgment of the District Court for the District of Columbia, entered April 3, 1959, dismissing petitioner's "Complaint For Conflict of Interest" seeking to restrain the respondents from

conducting fund-raising campaigns for private charitable organizations at Government expense, seeking to invalidate the recommendation of the Department Director for the dismissal of the petitioner from his probationary position of Statistical Draftsman GS-3 in the Department of Vehicles and Traffic, and seeking damages for the derogatory charges made in the official notice of dismissal.

The judgment of the District Court is found on page 24 of the record on appeal. The judgment of the Court of Appeals is found on page 3a of this petition's appendix.

OPINIONS

The findings of fact and the conclusions of law of the District Court are found on pages 22-24 of the record on appeal. The opinion of the Court of Appeals is found on page 2a of this petition's appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1959 (Pet. App. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether respondents' dismissal of petitioner from Government employment on unfounded dismissal charges, following petitioner's refusal to grant respondents' request for a contribution to a private charitable organization, was a violation of the solicitation act, United States Code, Title 18 Sec. 202.

CONSTITUTIONAL AND STATUTORY LAWS INVOLVED

The constitutional and statutory laws involved are: Constitutional Amendment, Art. X and United States Code, Title 18 Sec. 202. These laws are found on page 1a of this petition's appendix.

STATEMENT OF THE CASE

Relying upon 28 U.S.C. 1331 the petitioner William A. Albaugh, a citizen of the State of Maryland, filed on January 20, 1958, a "Complaint For Conflict of Interest" which was subsequently amended on April 3, 1958 and July 1, 1958 (R. 4-7, 8-9, 10) in the United States District Court for the District of Columbia seeking to restrain the respondents from conducting fund-raising campaigns for private charitable organizations at Government expense (R. 13-19), seeking to invalidate the recommendation of the Department Director for the dismissal of the petitioner from his probationary position of Statistical Draftsman GS-3 in the Department of Vehicles and Traffic (R. 20), and, seeking damages for the derogatory charges made in the official notice of dismissal (R. 20).

Petitioner alleged that, while employed in a probationary status as a statistical draftsman by the Traffic Engineering Division of the Department of Vehicles and Traffic of the District of Columbia Government, he and his fellow employes were, on October 10, 1957 and November 19, 1957, called away from their assigned duties by their supervisors, respondent Mitton, the head of the Traffic Engineering Divison, and respondent Keneipp, the Director of the Department of Vehicles and Traffic, and asked to make contributions to various private charitable

organizations through the "D. C. Third Annual One Fund Drive" (R. 17).

On January 7, 1958, petitioner was notified that, upon the recommendation of respondents Mitton and Keneipp, he was recommended to be separated from his position as a probationary employe. The official causes given for his separation were:

> "(a) Failing to demonstrate adequate ability to perform assigned duties in the preparation of collision and condition diagrams.
>
> "(b) Being a source of disturbance to co-workers by continually leaving assigned work area to converse with them on subjects unrelated to assigned duties."

Petitioner alleged that the official causes given for his dismissal were not true and constituted "malicious libel per se" and that the obvious reason for his dismissal was his open opposition to the "One Fund Drive."

On April 3, 1959, the District Court entered judgment for the defendants-respondents on the grounds that (1) respondents are not prohibited by statutory or constitutional law from participating in the fund raising campaigns challenged in the complaint; (2) respondents had authority under law to discharge petitioner from employment with the District of Columbia Government, and (3) respondent Mitton's recommendation that petitioner be dismissed did not constitute libel (R. 22-24). The petitioner appealed (R. 25), and on December 17, 1959, the Court of Appeals for the District of Columbia Circuit, failing to find a reversible error, affirmed the judgment of the lower Court (Pet. App. 3a).

ARGUMENT AMPLIFYING REASON RELIED ON FOR GRANTING THE WRIT

Petitioner Respectfully Submits That This Court Should Settle Whether Respondents' Dismissal of Petitioner From Government Employment on Unfounded Dismissal Charges, Following Petitioner's Refusal to Grant Respondents' Request for a Contribution to a Private Charitable Organization, Was a Violation of the Solicitation Act, United States Code, Title 18 Sec. 202

The solicitation act (App. 1a) provides briefly that any government employe who solicits funds for unofficial purposes with intent to have an official act influenced thereby shall have committed an unlawful act. Technically this law is unenforceable because mental states like "intent" are beyond proof by material evidence. However, the Courts as a matter of common practice rely upon this law to invalidate all contested unwarranted official acts which follow related unofficial solicitations.

In this case it is the petitioner's contention that his dismissal (R. 20) was an unwarranted official act, that it followed a related unofficial solicitation, and that the dismissal should be invalidated.

The primary issue of fact is whether the dismissal charges were true (R. 10 paragraph 13). Since no substantiating evidence was presented to the Trial Court by the respondents who had the burden of proof in accordance with the rule set forth in *Lilienthal's Tobacco* v. *U. S.*, 97 U.S. 237, 24 L. Ed. 901 (1877),

> "The burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue,"

the unsubstantiated dismissal charges were by default established as unfounded and the dismissal based upon them established as unwarranted.

The primary issue of law is whether the respondents had Constitutional authority to request the petitioner to make a donation to a private charitable organization. It is the petitioner's contention that government solicitation programs for the benefit of private charitable organizations, and particularly the Executive Order No. 10728 (R. 13) and the Commissioners' Order No. 55-702 (R. 16) authorizing these programs, are without Constitutional authorization and are in conflict with Constitutional Amendment, Art. X which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or the people,"

and which was interpreted in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 96 L. Ed. 1153 (1952), to mean:

> "The Government of the United States was created by ratification of the Constitution, and it derives its authority wholly from the powers granted to it by the Constitution which is the only source of power authorizing action by any branch of the Government."

In this case the petitioner was asked by order of the respondents to contribute to a private charitable organization called the United Givers Fund (R. 23) and when he refused to contribute he was dismissed from government employment. If there was no Constitutional authorization for the program, this request for

funds was an unofficial solicitation. If the dismissal was based upon unfounded dismissal charges, it is only reasonable to conclude that the dismissal was really caused by the petitioner's refusal to submit to the respondents' unofficial solicitation which preceded the dismissal and that the dismissal should be invalidated.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari as prayed for should be granted.

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